Supreme Court, U.S.
FILED

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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

SONJA INDRELAND McLAUGHLIN,
Petitioner,

v.

WASHINGTON STATE BAR ASSOCIATION, ET AL.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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HOP

QUESTION PRESENTED

The Ninth Circuit Court of Appeals has rendered a MEMORANDUM affirming the dismissal of Petitioner's 42 U.S.C. 1983 action on Fed.R.Civ.P. 12 (b)(1) motion by Defendants, based upon a longstanding routine abstention policy of the Ninth Circuit, which abstention policy conflicts with relevant decisions of the Supreme Court of the United States, and which abstention policy places an unconstitutional burden upon the Petitioner in her effort to vindicate federally protected rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States of America. The question thereby arising is:

Whether the Ninth Circuit Court of Appeals has entered a federal question jurisdictional ruling so in conflict with the Constitution of the United States and the relevant decisions of the Supreme Court of the United States as to call for the exercise of the supervisory power of the Supreme Court to conform the federal question jurisdictional policy of the Ninth Circuit to that adhered to by the Nation as a whole?

PARTIES TO THE PROCEEDING

The Petitioner is Sonja Indreland McLaughlin, *pro se*.

The Respondents are the Washington State Bar Association; Jean Kelly McElroy; Leland G. Ripley; and Dennis Hardwick.

The Respondents are all represented by Robert Welden, General Counsel
WASHINGTON STATE BAR ASSOCIATION

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In the

Supreme Court of the United States

October Term 1996

No._____

Sonja Indreland McLaughlin, Petitioner
v.
Washington State Bar Association, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Sonja Indreland McLaughlin petitions for a writ of certiorari to review the MEMORANDUM dismissing the COMPLAINT herein on Fed.R.Civ.P.. 12(b)(1) motion.

OPINIONS BELOW

The MEMORANDUM of the court of appeals is unreported. (App. *infra*, 1a-3a).

JURISDICTION

The court of appeals entered its MEMORANDUM and ORDER (App., *infra*, 1a-5a) on February 10, 1997. On April 10, 1997, Justice O'Conner extended the time for filing a petition for writ of certiorari to and including June 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

The COMPLAINT was brought pursuant to 42 U.S.C. 1983 and 1988 and Section 2201 *et seq.* Jurisdiction for the COMPLAINT is based upon U.S.C. 1331 and 1343. The COMPLAINT asserted pendent jurisdiction over state claims.

CONSTITUTIONAL PROVISIONS and RULES INVOLVED

Constitution of the United States of America, Article III, Section 2; Amendment I; Amendment V and Amendment XIV, Section 1.

Fed.R.Civ.P. 12(b)(1)

STATEMENT OF FACTS

The question herein presented brings for examination the longstanding abstention policy of the Ninth Circuit Court of Appeals which permits that Circuit to routinely disengage the federal district courts from litigation of federally protected rights in actions prosecuted against state bar associations by member attorneys under 42 U.S.C. 1983.

The Petitioner is trying to gain access to the Federal District Court of Eastern Washington to litigate her cause of action for depravation of First, Fifth and Fourteenth Amendment rights. She has filed a COMPLAINT which sets down complete and undisputed basis for subject matter jurisdiction under 42 U.S.C. 1983. So far, the COMPLAINT has been subjected to successful Fed.R.Civ.P. 12(b)(1) motion in the Federal District Court of Eastern Washington, affirmed in the Ninth Circuit Court of Appeals, both on the basis of the Ninth Circuit's abstention policy called the "*MacKay* Rule".

The Petitioner McLaughlin is prepared, upon the granting of the Petition, to show the Court compelling arguments which make it necessary for the Supreme Court to exercise its supervisory powers over the Ninth Circuit to prevent this unconstitutional abstention from taking place and to make it clear to the Ninth Circuit that it should desist from such abstentions as the one in this case, in the future.

McLaughlin's COMPLAINT presents all the federal question jurisdictional facts necessary for access to the District Court for litigation of her constitutional claims under 42 U.S.C.1983 and 1988. The facts relevant to

the cause of action which was dismissed by the Ninth Circuit are uncontroverted and therefor may be introduced to the Court in a summary fashion.

The Petitioner is Sonja Indreland McLaughlin 1, plaintiff below. Defendants below are the Washington State Bar Association [hereinafter called the WSBA], a statutory integrated bar, and its agents.

The COMPLAINT states that the Petitioner was a candidate for the elected position of Judge of the Superior Court of Okanogan County, Washington, a rural one judge county, in 1988. Her opponent was a powerful entrenched incumbent, well connected in the WSBA. Immediately after the election, the incumbent judge's campaign manager initiated an "investigation" of the content of McLaughlin's judicial campaign topical political speech, under authority of the Rules of Professional Conduct and the Rules of Lawyer Discipline of the WSBA.

The COMPLAINT states that the WSBA, with the publicly stated purpose of making an example of McLaughlin before the electorate and before other attorneys who might be contemplating candidacy for judicial positions, undertook to publicly "investigate" the content of McLaughlin's topical political speech uttered and published during the 1988

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1 In addition to her practice of law, McLaughlin is a trained social studies educator and a former official of the League of Women Voters, experienced over a period of 38 years in the conduct of non-partisan informational political campaigns.

Prior to starting her political campaign for the judgship, she carefully read the Code of Judicial Conduct and conformed her statements to it to the best of her ability and understanding. She believed that she conformed to the professional codes in every respect, and was surprised when she was questioned. It is a temptation to reveal the basis upon which McLaughlin was stigmatized and punished. But what McLaughlin, as a qualified candidate, said or did not say is irrelevant. The point is, government administrators are not empowered to inquire into topical political speech. Period.

judicial election campaign, under its newly adopted Rule of Professional Conduct 8.2(a)(b). The "investigation" took four years and was conducted under color of state law. [2]

The COMPLAINT further states that the WSBA then proceeded from the investigation to an "investigative hearing" before its own WSBA Disciplinary Board for offenses consisting of various topical political statements, the content of which the administrators of the WSBA found to be conduct consisting of speech which violated WSBA Rule of Professional Conduct 8.2(a)and (b).

The "investigative hearing" before the WSBA Disciplinary Board in McLaughlin's case resulted in a "recommendation" to the Board of Governors of the Bar Association for public stigmatization of McLaughlin in the form of public censure and public reprimand. Subsequently, McLaughlin was publicly stigmatized by the Board of Governors of the WSBA, both censure and reprimand, the text plainly indicating that the punishment was for unprofessional conduct consisting of utterance and publication of politically incorrect speech, offenses against Rule 8.2(a)(b).

The stigmatization was deliberately and extensively made public, along with the admonition to the public to regard the WSBA as the state speech police over all attorneys and all judicial elections in the State of Washington. The WSBA held press conferences and faxed copies of the stigmatization for politically incorrect speech to all newspapers, radio stations and television stations in the north central and eastern sections of Washington, as an "example" to other attorneys and to the public of what would happen to judicial candidates who said the wrong thing to the voters.

Further, the WSBA fined McLaughlin $6,736.00, the cost to the WSBA of the

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2 Revised Code of Washington 2.48

investigation into the content of McLaughlin's political speech in the 1988 election. The censure and reprimand of McLaughlin were published to all the legal professionals in the State of Washington in the *Bar News* and the *Judicial News*.

The COMPLAINT further states that McLaughlin protested throughout that the WSBA was abusing its state powers, acting in violation of the First, Fifth and Fourteenth Amendments of the Constitution of the United States of America. She said that the WSBA could not use color of state law to regulate topical political speech as conduct subject to attorney discipline by the administrators at the WSBA.

The COMPLAINT states that McLaughlin maintained that she was entitled to have her rights under the First Amendment litigated in judicial proceedings in an actual, adequate hearing before a court of competent jurisdiction. However, the COMPLAINT goes on to state that no judicial proceedings, whatsoever, were ever held from which a final decision of any state court could have been entered.

The COMPLAINT further states that the WSBA perpetrators of the depravation of McLaughlin's federally protected rights are not judicial officials under the laws of the State of Washington, and no investigatory proceedings held before the Washington State Bar Association's Disciplinary Board are judicial in nature. Under Washington Law, the COMPLAINT says, all disciplinary power is vested in the Supreme Court of Washington and is not delegatable.[3] The WSBA serves only as an investigator and prosecutor which acts in aid of the Supreme Court, but not in any judicial capacity.

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3 State ex rel Schwab, 80 Wn. 2d 266 (1972)

The COMPLAINT states that the WSBA has no judicial powers under state law. [4] The COMPLAINT further states that McLaughlin petitioned the Supreme Court of Washington to give her judicial proceedings in state court. The Supreme Court of Washington replied with an "ORDER" directed to the WSBA file on McLaughlin which said ***that it would not provide judicial proceedings before a competent judicial tribunal of the Court,*** to review the reprimand and censure meted out by the WSBA Disciplinary Board "investigation" process.

The COMPLAINT states that, over the years, the WSBA has taken unto itself, without statutory authorization, by custom and usage, the practice of state power of coercion over members to force member attorneys to submit to reprimand and censure within the bar association without going through the judges of the state supreme court, and without proceedings of right before the Washington Supreme Court being available to the accused

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4 State ex rel Schwab, 80 Wn. 2d 266 (1972); Miller v. Washington State Bar Association, 679 F.2d 1313 (9th Cir. 1981) Rehearing, 691 F.2d 431 (9th Cir. 1982);INTEGRATED BAR ACT, Revised Code of Washington 2.48. The Disciplinary Board of the WSBA is not judicially appointed nor recognized as part of the judiciary of the State. The members of the Disciplinary Board are not judicial officers of the State. It is a body composed of volunteer lawyer and lay members appointed by the Board of Governors of the WSBA, with no connections to the Supreme Court of Washington, whatsoever. In Washington, the disciplinary power over lawyers is vested exclusively in the Supreme Court, and can not be delegated. The Supreme Court of Washington does not concern itself with reprimand or censure but does provide judicial process to attorneys potentially subject to suspension or disbarment. By custom and usage, the WSBA uses the state power to coerce attorneys, which is part of its status as a state created integrated bar, to conduct its own investigations of its members, paid for by the dues of the WSBA members, and from these "investigations" conducted in "hearings" makes recommendations to its own Board of Governors for imposition by the Board of Governors of stigmatization upon the professional record of the offending attorney.

attorney. The documents produced by the WSBA verify this assertion.

McLaughlin had no right to judicial proceedings in the Washington Supreme Court under the existing Rules of Lawyer Discipline. The legal effect of her having petitioned and having been denied without explanation was similar to having a petition for writ of certiorari denied by the U.S. Supreme Court. Under the RLD, the Supreme Court of Washington did not have to explain why it denied McLaughlin's petition for judicial proceedings, and it did not do so. The denial of McLaughlin's petition was in no way a judicial ruling on the merits of the "discipline" imposed by the WSBA. This was acknowledged by the Defendants at the time, in writing.

The COMPLAINT states that McLaughlin then turned to the Supreme Court of the United States, in attempt to obtain writ of certiorari to the Supreme Court of Washington. But redress in the Supreme Court of the United States was barred by the fact that she had no final order from a state court from judicial proceedings. 81 U.S.C. 1257.

The COMPLAINT states that McLaughlin was *trapped* by unconstitutional Washington Rules of Lawyer Discipline which on the one side allowed the non-judicial "investigative" processes within the Bar Association to deprive her of Constitutional rights; and which on the other hand denied her the right to review of that depravation of rights in an actual, adequate judicial proceeding before a court of competent jurisdiction.

The COMPLAINT further states that, having no final court order from the Washington Supreme Court on which to base a petition for writ of certiorari to the Supreme Court of the United States, having suffered the depravation of her First Amendment rights and having witnessed the First Amendment rights of the Okanogan County electorate chilled by coercion and professional stigmatization of their

candidate for judicial office, under color of state law and without judicial proceedings before a court of competent jurisdiction, McLaughlin exercised her federal right and the federal right of the Okanogan County Community to recourse to and redress in the Federal District Court of Eastern Washington, under Sections 42 U.S.C. 1983 and 1988, by COMPLAINT, entered October 6, 1994.

There has been no contention by anyone in this action that the COMPLAINT is insufficient to present federal question subject matter jurisdiction under Article III, Constitution of the United States and the applicable jurisdictional statutes. The COMPLAINT presents allegation of all the jurisdictional facts necessary for the prosecution of a 42 U.S.C. 1983 action in District Court. The Defendants have not contested and can not contest those facts or contest that the COMPLAINT is complete in every requirement for subject matter jurisdiction in the district court. All jurisdictional facts are substantiated by documents produced by the Defendants during the proceedings against McLaughlin, by the published Rules of Lawyer Discipline, the Rules of Professional conduct, by citation to relevant case law clarifying the powers of the Washington State Bar and by the statute of the State of Washington which empowers the WSBA to act as an integrated bar.

McLaughlin's COMPLAINT was dismissed from the District Court of Eastern Washington on Fed.R.Civ.P. 12(b)(1) motion ***on the basis of the Ninth Circuit policy of comity abstention, commonly known in that Circuit as the "MacKay" Rule.*** (App., *infra*)

The Ninth Circuit Court of Appeals reviewed de novo and dismissed McLaughlin's COMPLAINT without oral argument in an unpublished MEMORANDUM which states no reason other than a paraphrase of the "*MacKay*" Rule.

Through these dismissals for lack of federal question subject matter jurisdiction,

McLaughlin came to the realization that the Ninth Circuit was inadvertently perpetuating abuse of power in attorney disciplinary proceedings in the State of Washington (and probably throughout the West) by its automatic, unreasoning invocation of its "*MacKay* Rule" to deprive attorney actions against bar associations of federal question subject matter jurisdiction. McLaughlin began to see how come the WSBA was so confident that it could override the constitutional rights of attorneys and the public with impunity.

The reason that the MEMORANDUM does not state any reasoning for its dismissal of McLaughlin's federal claims is that the Ninth Circuit Judges ***are not in the habit of saying why*** they dismiss an action such as the one brought by McLaughlin. For over twenty-five years the Ninth Circuit has maintained an informal blanket policy which enables the integrated bar associations of the states within it to be immune from scrutiny in the federal courts regarding alleged violations of attorney's constitutional rights perpetrated by integrated bars during the course of disciplinary proceedings. Over these years the Ninth Circuit has routinely denied in blanket fashion, without setting forth legal justification, recourse to the federal courts under 42 U.S.C. 1983 for redress for violation of attorneys' fundamental constitutional rights.

The justification always used by the Ninth Circuit is a quotation taken from their decision in *MacKay vs. Nesbett,* 285 Fed. Supp. 498 (Alaska 1968); Affirmed, 412 F.2d 846 (9th Cir. 1969)[hereinafter cited as *MacKay]*:

> *"orders of a state court relating to the admission, discipline, and disbarment of members of the bar may be reviewed only by the Supreme Court of the United States and not by means of an original action in a lower federal court."*

The MEMORANDUM is a "*MacKay*" ruling.

The Ninth Circuit Judges paraphrase the *MacKay* Rule, applying it in a blanket fashion, without giving any legal or factual reasoning, confident that everyone will know what they mean. It is a mindlessly routine, summary comity abstention jurisdictional disposal, ***unlawfully based on case law precedent.*** In the Ninth Circuit, the Fed.R.Civ.P.. 12(b)(1) motion is a sure shot to destroy the constitutional claims of an attorney bringing a cause of action under 42 U.S.C. 1983, because of the *MacKay* Rule.

REASONS FOR GRANTING THE PETITION

A.

By failing as a practical matter to enter justification for abstention, the Ninth Circuit abuses its power. The Ninth Circuit seems to labor under the mistaken notion that federal civil rights actions such as McLaughlin's are subject to limitation of entry into federal courts under principals of comity and abstention made up by the Ninth Circuit, itself, from it own precedent, the so-called "*MacKay* Rule".

McLaughlin's right to adjudicate her claims in Federal Court can not be barred or blocked by a Fed.R.Civ.P.. 12(b)(1) defense consisting of case law or judicial interpretation of case law. Subject matter jurisdiction is always determined case by case, by analyzing the allegations of the COMPLAINT.[5]

The Petitioner is prepared to show the Supreme Court that there is no such thing as general, blanket comity abstention rules which can be applied across the board to every case that comes in. Abstention is in fact an extraordinary judicial act. Each case is

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5 Allegheny County vs. Frank Mashuda Co.Pa., 360 U.S. 185 (1959)

carefully analyzed on its unique facts when abstention is considered, because ***the right to litigate federal questions in federal court*** is guaranteed under Article III, Section II of the Constitution--carefully guarded.

Over time it has become customary to recognize that federal questions can be litigated in state court, but the federal courts always make sure that a competent state forum for judicial litigation is available to the plaintiff before considering abstention.[6]

In civil rights litigation ***it is the right, not any limitation***, which is paramount at all times. *Thomas v. Collins*, 323 U.S. 516, (1945). A complaint can be dismissed on a Fed.Rule Civ.P. 12 defense ***only if it is clear that no relief can be granted under any set of facts alleged in the COMPLAINT***. *Hishon v. King and Spalding*, 467 U.S. 69 (1984).

The Supreme Court of the United States says that federal question subject matter jurisdiction which has been established by a well-pleaded COMPLAINT ***can not be defeated or blocked by precedents taken from the text of previous case law.*** Subject matter jurisdiction is founded upon the well-pleaded COMPLAINT, not upon case law precedents. *Christianson vs. Colt Industries Operation Corp.*, 486 US 800(1984).[hereinafter called *Christianson*] The Ninth Circuit Memorandum blatantly disregarded the directives given to all lower federal courts in *Christianson*, as well as in many other cases, ***not to depend on case law precedents, but to justify abstention only from facts pled in the COMPLAINT.***

The Ninth Circuit did not analyze the allegations of the COMPLAINT, at all, and therein lies the serious error in procedure

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6 Bell v. Hood, 327 U.S. 678, (1946); Miller v. Washington State Bar Association, 679 F.2d 1313 (9th Cir. 1981) Rehearing, 691 F.2d 431 (9th Cir. 1982); Middlesex County Ethics Committee vs. Garden State Bar Association, 457 U.S. 423, (1982); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)[hereinafter called Feldman]

requiring the supervisory intervention of the Supreme Court.

B.

The Ninth Circuit, by routine indiscriminate application of its "general rule" to render blanket denials of subject matter jurisdiction over actions otherwise properly pled by attorneys against bar associations, violates the fundamental duty to adjudicate which binds all the lower federal courts.

The jurisdictional power of the lower federal courts is invoked by the well-pleaded COMPLAINT and the pleading of meritorious facts going to establishment of the federal question (subject matter) jurisdiction under statute in the action.[7]

In the present action the fact that the COMPLAINT set down complete federal question subject matter jurisdiction under 42 U.S.C. 1983 is not questioned by the Ninth Circuit Court of Appeals. The *de novo* opinion of the Ninth Circuit Judges is based entirely upon comity abstention. The terse MEMORANDUM opinion is entire, as follows:

> *"Here, McLaughlin's complaint would have required the district court to review the final decision of the state court regarding the application of WSBA Rule of Professional Conduct 8.2 to McLaughlin's license to practice law.*
>
> *Accordingly, the district court lacked jurisdiction over her 1983 action."*

(As revealed hereinabove, the COMPLAINT shows that there is no final decision of any state court regarding the application of Rule 8.2 to McLaughlin's license. ***This indicates that the Ninth Circuit did not even read the uncontradicted, indisputable jurisdictional facts set down in the COMPLAINT.***)

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7 Christianson vs. Colt Industries Operation Corp., 486 US 800, 108 S.Ct. 2166, 100 L.Ed. 2d 772 (1984).

Love vs. U.S., 915 F. 2d 1242 (9th Cir. 1989)

In such a case as this one, the Ninth Circuit has the duty to compel the District Court to try the action unless it can produce a countervailing comity abstention argument that is ***stronger*** than the citizen's statutory right to access the federal court for redress for depravation of her civil rights. Once a plaintiff has submitted a pleading which establishes jurisdiction in the federal courts to adjudicate over a given action, THEN, the federal court must and shall adjudicate the case. ***Defendants who interpose a Fed.R.Civ.P. 12(b)(1) defense must show an argument more powerful than the federal court's duty to adjudicate the case and the plaintiff's right to entry into federal court.***

Entry for litigation into the lower federal courts is a right. The very old Supreme Court case, *Illinois C.R. Co. v. Adams*, 180 U.S. 28 (1901), still good today, shows that from the onset of the twentieth century, the power of the federal courts to adjudicate a matter once established by a well-pleaded complaint, is a ***right*** vested in the citizen invoking it:

> *"Jurisdiction is the **right** to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and the evidence....Where a bill sets up violation of the federal constitution, the federal court must take jurisdiction, where it is determines that the question is made in good faith and it is presented to it for its decision."*

Other, more recent Supreme Court rulings say the same thing:

England v. Louisiana St. Bd. of Medical Examiners, 375 U.S. 461,464 (1964)

> *"Congress, pursuant to Constitutional Authorization, has conferred specific categories of jurisdiction upon the federal courts, with the principle that "When a federal court is properly*

appealed to in a case which it has by law jurisdiction, it is its duty to take such jurisdiction."

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976):

"The federal district court has "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."

Allegheny County vs. Frank Mashuda Co.Pa., 360 U.S. 185 (1959)

Refusal of the federal district Court is "undesirable". District court can not refuse to discharge its responsibility to adjudicate, to "render prompt justice", mandated under 28 U.S.C. 1332 where jurisdiction has been properly invoked.

Decision on a Fed.R.Civ.P. 12(b)(1) motion based on comity abstention requires an examination of the unique jurisdictional facts of each case individually and a showing of legal reasons why the jurisdictional facts pled do not entitle the plaintiff to enter federal court.[8] Merely repeating a general policy as the Ninth Circuit did in its MEMORANDUM is not enough to dismiss a well-pleaded COMPLAINT which sets forth the required federal question jurisdictional facts.

Abstention and comity are doctrines which are court made, case by case, as extraordinary judicial acts. When the Ninth Circuit faces a conflict between statutory authority which imposes duty upon the Court to try the case, and its own desire to abstain in deference and comity to a state, THEN, the Ninth Circuit is under duty to justify the abstention in a reasoned opinion.

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8 Bell v. Hood, 327 U.S. 678, (1946)
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)[hereinafter called Feldman]

The Ninth Circuit did not do this. Instead, it entered two sentences as a ruling dismissing its duty to adjudicate in favor of a final decision of a state court which is not even cited or described in the MEMORANDUM, and which states no reasoning whatsoever that this anonymous decision of a state court is of any importance to the subject matter of the action being litigated. (In fact there is no final decision of a state court in the McLaughlin facts.) ***The absence of a final state court decision is one of the reasons that McLaughlin's action should be adjudicated in district court.*** In addition, the entire fourth cause of action, devoted to the infringement on the First Amendment right of the Okanogan County electorate is not addressed and could not be addressed by any final decision of the Washington Supreme Court regarding R.P.C. 8.2, because the electorate are not lawyers governed by the WSBA.

The Ninth Circuit Court of Appeals has authorized the District Court to abstain from trying McLaughlin's constitutional claims pled under 42 U.S.C. 1983, in keeping with its routine dismissal policy. In so doing, the Ninth Circuit Judges have permitted the District Court to violate its most fundamental duty to the people of the United States, that is, the duty to adjudicate over federal question claims properly pled before the court.

C.

The "MacKay Rule" is not valid as a rule of general application, to be used as basis for dismissal of attorney 42 U.S.C. Section 1983 lawsuits against bar associations. The *MacKay* precedent is for non-intrusion situations.

The *MacKay* opinion was never intended to be a foundation for a general rule, applied indiscriminately to all 1983 attorney discipline cases. In fact, the so-called "*MacKay* Rule is not a rule at all. It is spe-

cific ruling on the conflict of two specific federal laws, never meant to be a general rule of abstention.

The so-called "*MacKay* Rule" had its origins in a case called *MacKay v. Nesbett*, decided in the U.S. District Court for Alaska and affirmed by the Ninth Circuit Court of Appeals in 1968. The reasoned opinion in the *MacKay* case is found in the District Court of Alaska, where a Judge Plummer found a lack of subject matter jurisdiction over the 42 U.S.C. 1983 action of an attorney asking for an injunction against attorney discipline proceedings then ongoing in the Supreme Court of Alaska (an injunction against a state court proceeding). Judge Plummer found a conflict of laws between 42 U.S.C. 1983 and another federal law, 28 U.S.C. Section 2283, which forbids intrusion by federal courts into ongoing state proceedings.

Judge Plummer ruled that Section 2283 dominated over 42 U.S.C. 1983 and abstained from deciding the 1983 action on the basis of statutory non-intrusion, carefully noting that the plaintiff attorney was being given judicial proceedings in the state court and that the state court proceedings were considered competent to render judgment over federal constitutional claims.

So, the "*MacKay* Rule" which the Ninth Circuit has used as the general rule for attorney 1983 actions is nothing more than a restatement of statutory federal law, mandatory non-intrusion when two statutes pull the District Court in opposite directions. It does not set any precedent, whatsoever, for a policy of routine abstention to bar entry into court in all 42 U.S.C. 1983 actions brought by attorneys against state bar associations, as the Ninth Circuit now says. [9]

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9 The Supreme discusses and distinquishes the MacKay Rule on page 1317 of the case District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983):

D.

By failing as a practical matter to enter valid justification for abstention, the Ninth Circuit abuses its power. A comity abstention opinion must overcome the duty to adjudicate and the right of the citizen to access the federal courts by reasoning based on the facts pled.

The Ninth Circuit seems to labor under the mistaken notion that federal civil rights actions are subject to limitation of entry into federal courts under "general" abstention rules. But in fact, comity and abstention are areas of jurisdictional law which are ***never*** subject to general rules. Each case is decided separately on comity abstention. Especially in civil rights litigation where it is the right, not any limitation, which is paramount at all times, a complaint can be dismissed on a Rule 12 defense only if it is clear that no relief can be granted under any set of facts alleged in the COMPLAINT.[10]

Subject matter jurisdiction is founded upon the well-pleaded COMPLAINT, not upon case law precedents. The Supreme Court of the United States says that ***federal subject matter jurisdiction which has been established by a well-pleaded COMPLAINT can not be defeated or blocked by precedents taken from the text of previous case law.*** *Christianson vs. Colt Industries Operation Corp.* 486 US 800 (1988).

"In this regard 28 U.S.C. Section 1257 does not act as a bar to the district court's consideration of the case, and because the proceedings...are non-judicial, the other policies prohibiting the United States District Court review of final state court judgments (non-intrusion) are not implicated."

10 Thomas v. Collins, 323 U.S. 516, (1945)
Hishon v. King and Spalding, 467 U.S. 69, 104 S.Ct.2229, 81 L.Ed. 2d 59 (1984)
Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773 (1946)

The Ninth Circuit can not use the *MacKay* rule as a general rule applied to McLaughlin's causes of action. McLaughlin's right to adjudicate her claims in Federal Court can not be barred or blocked by a defense consisting of case law or judicial interpretation of case law. Subject matter jurisdiction is always determined *de novo* by analyzing the allegations of the particular COMPLAINT before the court for ***countervailing state interest.***

The reason why the application of the *MacKay* rule in this case can not be tolerated is that the Ninth Circuit did not justify its abstention by facts showing countervailing state interest stronger than the right of the plaintiff to adjudicate in state court, as required by the Supreme Court of the United States.

E.

The blanket abstention policy based on the MacKay case, used to dismiss McLaughlin's 42 U.S.C. Section 1983 action in the Ninth Circuit, defies more recent directives of the Supreme Court which have superseded that policy.

The Ninth Circuit has entered an abstention ruling based on a comity policy peculiar to Ninth Circuit jurisprudence, called the "*MacKay* Rule". In so doing, the Ninth Circuit Court of Appeals has decided an important federal question, a matter of imperative constitutional importance, in a way which conflicts with more recent decisions of the Supreme Court of the United State, in two cases, *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)[hereinafter called *Feldman*]; and *Middlesex County Ethics Committee vs. Garden State Bar Association, 457 U.S. 423, 102 S. Ct. 2515 (1982)[*hereinafter called *Middlesex].* The *MacKay* Rule has been ***superseded by specific instructions*** from the Supreme Court of the United States, which direct the lower federal courts to analyze each action individually on

a case by case basis, before denying federal question subject matter jurisdiction to litigants bringing actions similar to that brought by McLaughlin against the WSBA under 42 U.S.C. 1983.

The Ninth Circuit blanket policy of abstention from litigation over bar association disciplinary proceedings is now antiquated. The Supreme Court of the United States has rendered opinions subsequent to the *MacKay* ruling which supersede and clarify federal abstention policy in the area of state bar association regulation of federally protected rights of attorneys which are actionable under 42 U.S.C 1983. The *MacKay* rule has been superseded by more precise Supreme Court rulings in *Middlesex* and *Feldman* which delineate the standard by which 1983 actions in the lower federal courts may be litigated under federal question subject matter jurisdiction.

The *Middlesex* and *Feldman* opinions say in effect that all matters not litigated and subject to final adjudication in judicial proceedings in state court can be tried under 42 U.S.C. 1983 jurisdiction in the lower federal courts.

In fact the case *MacKay vs. Nesbett* ***has no value at all***, now, as a "general rule". Under the relevant cases decided in the Supreme Court of the United States, *Middlesex* and *Feldman*, the federal district court is instructed to look to the facts unique to each individual 42 U.S.C. 1983 action brought by attorney plaintiffs against bar associations.

The Supreme Court of the United States has sorted out and clarified the questions of federal subject matter jurisdiction presented in this Petition for Writ of Certiorari, and ***directives are in place to be followed by the lower federal courts.***

Both of the major cases, *Middlesex* and *Feldman*, make it clear that federal question subject matter jurisdiction in a 42 U.S.C.

1983 action brought by an attorney against a bar association is determined by the nature of the proceedings which were held below, not by any formality such as "a final decision of a state court." McLaughlin is prepared to show in her argument on this appeal that the "*MacKay* Rule" of the Ninth Circuit has been repudiated for years by the Supreme Court of the United States and has only persisted in the Ninth Circuit because nobody has challenged its reasoning.

The fact is, that McLaughlin is now entitled to bring her action in the lower federal courts under her facts. *Middlesex* and *Feldman* set down a very simple standard:

1. The federal district court has entire federal question jurisdiction over an action brought by an attorney against a bar association under 42 U.S.C. 1983 **UNLESS**, the bar association defendant can show that the attorney's claim has been given actual, adequate judicial proceedings before a court of competent jurisdiction in the state. *Middlesex*

2. The aggrieved lawyer can litigate in federal court all constitutional and federal claims which have not been litigated by the supreme court of the state in state judicial proceedings. *Feldman*

3. Only matters inextricably intertwined with a decision from a state court judicial proceeding can be excluded from the district court litigation of an attorney's 42 U.S.C. 1983 claim. *Feldman*

The recent Supreme Court case law on abstention and comity applicable to the present action is quite different than has been applied by the Ninth Circuit in the McLaughlin MEMORANDUM.

Current abstention directives have evolved out of the concept of comity in federal state relations. The idea is that in an area where both the state and federal courts act as a matter of course, the states

have legitimate governmental interests which are best left to litigation in the state courts, all things being otherwise equal. This is the gist of the ruling in Younger v. *Harris,* 401 U.S. 37 (1971)[hereinafter called *Younger*]. Abstention in 42 U.S.C. 1983 cases is now based on the presumption that state courts are just as competent to litigate actions involving federally guaranteed rights as are federal courts.

In actions involving attorney discipline, the federal courts generally defer to state courts on the rationalization that attorney discipline is important to the integrity of the function of the state courts, attorney discipline matters being quasi-criminal in nature governed by the abstention principles enunciated in the *Younger* case.

However, the Supreme Court of the United States has laid down stiff criteria which must be present in 42 U.S.C. 1983 actions growing out of attorney discipline, before such a complaint can be dismissed on the basis of abstention, where the plaintiff has properly asserted her right to litigate in district court and has invoked the duty of the federal courts to adjudicate redress for depravation of federally guaranteed rights by a well-pleaded complaint.

The following criteria are laid down in *Middlesex vs. Garden State Bar*:

1. There must be an ongoing state proceeding which will be interrupted if the 42 U.S.C. 1983 action commences in federal court. State court must be given a chance to finish its work properly and adjudicate the federal questions to conclusion in the state forum.

Going along with this, in attorney discipline matters, the state itself must consider the attorney discipline process judicial in nature. Many states, one of them being Washington, bifurcate the disciplinary functions so that matters of suspension and disbarment are litigated in judicial

proceedings of right and the punishment is imposed by the Supreme Court; whereas censure and reprimand are not judicial sanctions but are meted out by the Board of Governors of the Bar Association and no judicial proceedings, as such, are held. ***The attorney subject to Board of Governors punishment is not allowed judicial proceedings of right and therefore the Middlesex criteria apply to censures and reprimands in Washington, allowing McLaughlin into district court as a matter of right.***

2. The litigation in state court must be over a legitimate state interest, as in the *Younger* case. In an attorney discipline, that interest has to be justified in terms of the function of the courts and the integrity thereof. The McLaughlin discipline was not rendered in protection of any legitimate state interest. *Gentile vs. State Bar of Nevada, 501 U.S. 1030 (1991)*

3. There can be no bad faith, harrassment or other exceptional circumstances which would indicate that due process of law has not been rendered in the state proceedings. In the McLaughlin action the allegations show nepotism and discipline used to destroy one person in order to help another person who is powerful and well-connected within the WSBA.

4. The crucial criterion for the present Petition for Writ of Certiorari is that the 42 U.S.C. 1983 plaintiff must be shown to have raised and had timely decided by a competent state tribunal, the federal issues involved. The Ninth Circuit in the present action can only overcome its duty to provide a forum for the litigation of the federal claims by showing that McLaughlin's claims have ***already been litigated and competently decided below*** in a state court of competent jurisdiction. That is ***impossible*** because McLaughlin's censure and reprimand were never subjected to supreme court judicial proceedings in Washington. The Supreme Court of Washington refused to provide judicial proceedings to

McLaughlin and she had no right under the Rules of Lawyer Discipline to demand that judicial proceedings be provided. ***This alone justifies the subject matter jurisdiction in the district court in this action.***

The modern abstention directives from the Supreme Court of the United States say that the Ninth Circuit is under duty to specify and describe the "final decision" of the state court as to whether the particular proceedings which led to the decision litigated the federal issues involved in judicial proceedings which adequately provided the plaintiff with a state forum for litigation ***of her constitutional claims.*** *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)

The facts, clearly set forth in the COMPLAINT and uncontested by the WSBA, show that there never was a final decision by any state court whatsoever regarding "the application of the WSBA Rule 8.2 to McLaughlin's license to practice law". No judicial proceedings, whatsoever, were held in the State of Washington on the application of Rule 8.2 to McLaughlin's license to practice law. ***For that reason it is now impossible for the Ninth Circuit to reject the McLaughlin COMPLAINT*** .

If the Ninth Circuit would have read the COMPLAINT during the course of their *de novo* review and had taken cognizance of the directives from the Supreme Court which have superseded the *MacKay* Rule, this Petition for Writ of Certiorari would never have had to be submitted to correct the Ninth Circuit Judges.

CONCLUSION

This Petition for Writ of Certiorari is proposed in order for McLaughlin to gain access under federal question jurisdiction (42 U.S.C. 1983) to the lower federal courts to litigate undisputed constitutional claims of herself and the Okanogan County electorate,

including claims that the depravation of her constitutional rights was committed by state administrators, wrongfully acting under the color of state law, in abuse of power, who deprived her of her liberty without actual, adequate, meaningful adjudication before a state court of competent jurisdiction, and chilled the First and Fourteenth Amendment rights of the Okanogan County electorate to listen to full and free debate among the candidates in their judicial election process.

The COMPLAINT sets down an overwhelming position of federal question subject matter jurisdiction which is entirely undisputed by the defendants. The COMPLAINT is simply not subject to the usual defenses under Fed.R.Civ.P. 12(b)(1). In five causes of action the COMPLAINT specifically describes the subjection of McLaughlin, other attorneys, and the voters of Okanogan County to the depravation of their rights, privileges and immunities secured by the Constitution and laws of the United States, at the hands of the Defendants in the case, acting under color of state law in abuse of the power vested in them.

The COMPLAINT shows how the WSBA and the named Defendants committed acts which: (1) Abridged and chilled the classic topical political speech of McLaughlin and future attorney candidates for judicial position, in the pure forum of a public election process; and abridged the right of the voters of the Okanogan County Community to hear and judge what McLaughlin had to say as a candidate for public office. (2) Defendants persecuted, harassed, publicly punished, financially penalized and placed humiliating governmental stigmatization on the public professional record of McLaughlin---all for the uttering and publication of speech which was allegedly critical of a public official; (3) Defendants used governmental licensing authority to force McLaughlin to choose between obedience to

unconstitutional infringement upon her liberties and her license to practice law.

The COMPLAINT set down by McLaughlin is not based on a hypothetical which might happen in the future. McLaughlin sets down actual enforcement which took place, which presented and does present a chilling effect upon exercise of First Amendment freedoms by potential candidates for judicial position caused by now existing WSBA governmental rules. The very existence of these rules and their vagueness presently chills the First Amendment rights of attorney candidates for judicial office and of the voting communities who have the right to hear what candidates for judicial office think should be said.

What is more, the COMPLAINT sets down the arrogance of the WSBA zealots, who had the audacity to think that they, as administrators, are empowered to regulate topical political speech of attorney candidates for judicial office by use of licensing coercion. ***Not even the Supreme Court of Washington can do that.***

The WSBA even admitted that its actions against McLaughlin violated fundamental civil rights, claiming that what happened had to be done in the "compelling state interest" of the State of Washington. Furthermore, the WSBA admitted that it engaged in the persecution and stigmatization of McLaughlin for the stated purpose of making an example of her to the public and to other attorneys. The actions of the WSBA were admitted by them to be a deliberate assertion of power over the topical political speech of attorneys in the State of Washington. The persecution and stigmatization were purposely publicized in the media, the hearings were publicly held in a large room with television, radio and newspaper coverage for maximum distribution and information to the public and to attorneys contemplating candidacy for judicial office.

It is undisputed that the documents produced by the WSBA during the course of the "discipline" of McLaughlin for speech offensive to the administrators show that the WSBA is aware that Rule 8.2 violates the First Amendment Rights of the member attorneys and of the public. However, it is the public position of the WSBA in the McLaughlin persecution that, although the "First Amendment rights are important" the State of Washington has "compelling state interest" in regulating the topical speech of attorneys as professional conduct, through the WSBA, more powerful than federally guaranteed rights under the Constitution.

This Petition shows that the outrageous conduct of administrators at the WSBA could have been predicted to happen by virtue of the fact that the Ninth Circuit Court of Appeals has been giving integrated bar associations free rein to abuse members (under the "*MacKay* Rule") for over twenty-five years. By its blanket, routine refusal to allow attorney actions against bar associations under 42 U.S.C. 1983, the Ninth Circuit has assured the bar administrators that they are free to pursue whatever regulation of attorneys that they care to devise.

The McLaughlin experience is an example of how the WSBA Rules of Professional Conduct, the Washington Rules of Lawyer Discipline and the Ninth Circuit "general rule" abstention policy have combined to become virtually a licensing of attorney speech in the Ninth Circuit. The magic combination happened in the McLaughlin case. The new unconstitutional Rule 8.2, which subjected attorney speech to WSBA regulation as conduct subject to disipline, was adopted in 1985 and was enforced against McLaughlin in the very next judicial election in 1988 by corrupt WSBA officials at the behest of a powerful judge who wanted to eliminate his opposition. The WSBA knew that the Rules of Lawyer Discipline

trapped McLaughlin because of the fact that no review of right by the Supreme Court of Washington judicial officials existed in those Rules. McLaughlin could not go the Supreme Court of the United States with a challenge to Rule 8.2 or the depravation of due process of law because she would have no final decision of a state court from which to appeal. Lastly, the WSBA administrators knew that the Ninth Circuit would not allow a 42 U.S.C. 1983 action to commence in federal district court under the long standing routine abstention policy for such cases, the "*MacKay* Rule".

The COMPLAINT presents matters of serious public concern. The Supreme Court of the United States must intervene in excercise of the supervisory powers to protect the public from the careless disregard which has been demonstrated to exist in the Ninth Circuit. The lawsuit must be allowed to go forward in the federal district court.

McLaughlin and the voters of Okanogan County are citizens who have been trapped by a surrealistic combination of abuse of state power and federal court abstention policy, which combination has deprived them of all possible forums in which to vindicate their fundamental civil rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States of America. ***The denial of federal question jurisdiction to McLaughlin in the present action is denial of the only opportunity that these citizens have to present federal claims under the First, Fifth and Fourteenth Amendments to the Constitution before any court of competent jurisdiction, under the circumstances.*** The denial of federal question jurisdiction to the attorney in this case is denial to all of opportunity to present the federal claims under the First Amendment to the federal forum for redress, and thus is an extremely serious matter. (The attorneys are the ones who know what is going on in the administration of the

courts. Muzzling the attorneys places the third branch of government above scrutiny by the public. *Gentile vs. State Bar of Nevada, 501 U.S. 1030 (1991)*

The petition for writ of certiorari herein is an act of faith in the American constitutional system of government. McLaughlin refuses to believe that the Ninth Circuit will be upheld in its denial of federal question jurisdiction for redress against what is clearly and unequivocally an undisputed and publicly acknowledged depravation of the most fundamental and necessary of the freedoms guaranteed to the people of the United States under the First and Fourteenth Amendments to the Constitution, that is the freedom to engage in topical political speech in public campaigns from which our public officials are elected, without fear of sanction.

Furthermore, McLaughlin knows that ***the First Amendment and all the rest of the freedoms guaranteed under the Constitution are meaningless without provision for federal court redress in the case persons acting under the color of state law engage in depravation of those rights.***

McLaughlin believes that the Supreme Court of the United States will not allow the perpetuation of Washington Bar Association Rules and the Ninth Circuit erroneous policy of abstention which insures impunity to the WSBA and other integrated bar associations within the Ninth Circuit, in abuse of power, in violation of the fundamental freedom of Constitutional government--the freedom of topical political speech in the public election forum.

The QUESTION PRESENTED by this Petition is now answered.

McLaughlin is prepared to show the Court that the Ninth Circuit MEMORANDUM is way out of line with the jurisdiction directives

coming out of Supreme Court of the United States, and that the Ninth Circuit is systmatically denying attorney citizens of their fundamental civil rights by foreclosing access to the lower federal courts to actions arising out of state bar association attorney discipline, without the inquiry on a case by case basis into proceedings held below.

What is more, McLaughlin has shown that the Judges of the Ninth Circuit dismissed McLaughlin's claims as a matter of course, under a blanket rubber stamp rule without any inquiry, whatsoever, into what process actually took place in the state, and as to whether or not McLaughlin ever was given an actual, adequate judicial hearing on her federal claims before being deprived of her fundamental constitutional rights by the Washington State Bar Board of Governors.

The Ninth Circuit Court of Appeals has authorized District Court abstention from adjudication of McLaughlin's First Amendment claims out of adherence to an outdated, legally erroneous policy of careless indifference to the directives for abstention from litigation propounded by the Supreme of the United States. The careless indifference of the Ninth Circuit in the MEMORANDUM, and in such cases previously decided according to the Ninth Circuit "*MacKay* Rule" place an unconstitutional burden upon McLaughlin's constitutional right to litigate her federal claims under 42 USC Sec. 1983, and upon the same constitutional rights of others similarly situated.

McLaughlin has shown that the U.S. Supreme Court has already clarified how and under what circumstances recourse to the lower federal courts under 42 USC 1983 may be taken in situations like this one, in the *Feldman* and *Middlesex* opinions, hereinabove discussed.

McLaughlin then showed how the Ninth Circuit has ignored the directions of the U.S. Supreme Court and persists in its own

antiquated policy of blanket abstention, refusing to allow litigation of any 42 USC 1983 actions brought by attorneys against state bar associations within the Circuit, as a gesture of comity to the state courts. The policy has become so moribund that the Ninth Circuit did not even look to see whether the state court had actually acted in McLaughlin's case (which it had not) before booting McLaughlin out of District Court on an abstention ruling. McLaughlin is now able to point to her own dismissal as an example of the extreme carelessness with which the Ninth Circuit is treating federal subject matter jurisdiction litigation.

The Ninth Circuit has entered a federal question jurisdictional ruling so in conflict with the Constitution of the United States and relevant decisions of the Supreme Court of the United State as to call for the excercise of the supervisory power of this Court to conform the federal question jurisdiction policy of the Ninth Circuit to that adhered to by the Nation as a whole.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated June 2, 1997.

Respectfully submitted.

Sonja Indreland McLaughlin

SONJA INDRELAND McLAUGHLIN
Petitioner, *pro se*

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA INDRELAND MCLAUGHLIN,

Plaintiff-Appellant,

v.

WASHINGTON STATE BAR ASSOCIATION, JEAN KELLY MCELROY, LELAND G. RIPLEY, DENNIS HARDWICK,

Defendant-Appellee.

No. 95-35348

D.C. No. CV-94-00363-WFN

MEMORANDUM*

FILED
AUG 19 1996
CATHY A. CATTERSON,
CLERK, U.S. COURT
OF APPEALS

REHEARING DENIED Feb. 10, 1997

Appeal from the U.S. District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, District Judge,
Presiding

Submitted August 12, 1996**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Accordingly, McLaughlin's request for oral argument is denied.

Before: BROWNING, SCHROEDER, and RYMER
Circuit Judges.

Sonja Indreland McLaughlin, an attorney, appeals the district court's order dismissing part of her 42 U.S.C. & 1983 action for lack of subject-matter jurisdiction. McLaughlin sued members of the Washington State Bar Association ("WSBA") alleging that WSBA Rule of Professional Conduct 8.2 was unconstitutional. We have jurisdiction pursuant to 28 U.S.C. & 1291, and we affirm.

We review de novo a district court's determination that it lacked subject-matter jurisdiction. Skagit County Pub. Hosp. Dist. No. 2 v. Shalala, 80 F.3d 379, 384 (9th Cir. 1996).

Here, McLaughlin's complaint would have required the district to review the final decision of the state court regarding the application of WSBA Rule of Professional Conduct 8.2 to McLaughlin's license to practice law.

Accordingly, the district court lacked jurisdiction over her section 1983 action. See District of Columbia Ct. of App. v. Feldman, 460 U.S. 462, 486-87 (1983); Dubinka v. Judges of Superior Court, 23 F.3d 218, 221 (9th Cir. 1994); see also MacKay v. Nesbett, 412 F.2d 846, 846 (9th Cir. 1969) (per curiam).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SONJA INDRELAND MCLAUGHLIN,

Plaintiff-Appellant,

v.

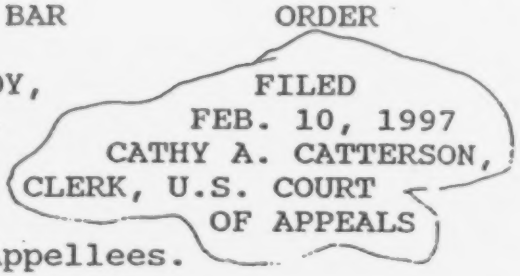
WASHINGTON STATE BAR ASSOCIATION, JEAN KELLY MCELROY, LELAND G. RIPLEY, DENNIS HARDWICK,

Defendants-Appellees.

No. 95-35348

D.C. No. CV-94-00363-WFN
Eastern Washington (Spokane)

ORDER



Before: BROWNING, SCHROEDER, and RYMER, Circuit Judges.

Appellant's motions to recall the mandate, to file a late petition for rehearing, and to file an amended and revised petition for rehearing are granted. Appellant's amended and revised petition for rehearing, received on September 30, 1996, is order filed.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to

rehear the matter en banc. See Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.